IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 694 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DILIPBHAI HIMATSINH MIR

Versus

STATE OF GUJARAT

Appearance:
MR FB BRAHMBHATT for Appellant
MR KG SHETH APP for Respondent No. 1

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 30/07/2002

ORAL JUDGEMENT (Per : MR.JUSTICE J.R.VORA)

1. This appeal is filed by the appellant who was accused in Sessions Case No. 36/95 of the Court of Sessions Judge at Mehsana, being aggrieved and dissatisfied by the judgment and order dated 31st May, 1995 delivered by the learned Additional Sessions Judge,

Mehsana in above said Sessions Case, convicting the present appellant for the charges under Section 302 of the Indian Penal Code and sentencing him for the imprisonment of life and fine of Rs. 500/-, in default rigorous imprisonment of one month.

2. The prosecution case disclosed that PW1 Dharmiben widow of Jiva Hemani, Vaghri by caste, aged about 65 at the relevant time, resided at Savala Darwaja, Visnagar and was doing labour work. Her husband died years back from the date of incident. There was no issue through this wedlock to Dharmiben. Real sister of Dharmiben named as Bhikiben and husband of Bhikiben, Dharma Vaja, were staying together with Dharmiben. Bhikiben died 10 years before the incident and husband of Bhikiben had left after the death of Bhikiben and re-married and was thereafter staying at Abu Road. The children of Bhikiben were staying with Dharmiben. Before many years one Thakore Babulal Mohanlal, resident of Mehsana, was acknowledged/accepted by Dharmiben as a brother and she was treating this Babulal as her brother and said Thakore Babulal Mohanlal and his family was also treating Dharmiben as such. Babulal had died many years before incident and thereafter his wife Malaben had gone to Kalol to stay with his son-in-law Hinmatji Shankarji. Babubhai and Malaben had two daughters, named Ramilaben and Bhanuben. In the present incident, the daughter of Malaben, Ramila is deceased and Victim. Ramila and Bhanu both were married. On 7th November, 1994 Malaben and her husband Dilipbhai Himatsinh Mir present appellant came to the house of Dharmiben and conveyed to Dharmiben that Ramilaben had been to the house of Dharmiben for claiming a sari as she was the daughter of acknowledged brother of Dharmiben. It appears that it is a custom to offer gift and saries on good occasions and festivals to the daughters of the family. Dharmiben conveyed to both of them that on the next day she would purchase sari for Ramila. This happened when Dharmiben returned from her labour work at about 7'O clock in the evening. Ramila and her husband, according to the prosecution case, were in drunken condition. Ramila had consumed more liquor. Thereafter present appellant and his wife Ramila both slept in the room adjoining to the house of Dharmiben. In the morning of 8th of November, 1994, Amratben, daughter of Bhikiben who was staying with Dharmiben went to the said room to awaken Ramila and the appellant. She found that present appellant was not present in the room and Ramila was dead. She informed to Dharmiben and others. Dharmiben made search for the appellant but he was not found round about, so she decided to go to Kalol to inform Malaben mother of Ramilaben. She went to Kalol

and informed about the incident to Malaben - mother of Ramilaben, Banuben sister of Ramilaben and Hinmatji Shankarji husband of Banuben. All the three accompanied Dharmiben and came to Visnagar at the scene of offence. Dharmiben could not ascertain the cause of death of Ramila, so she informed Visnagar Police Station about the death of Ramila, which was registered by Visnagar Police Station as Accidental Death Entry No.22 of 1994 and inquest panchnama was drawn and the dead body of Ramila was sent for postmortem. On 8.11.1994 at about 14.30 hours Dr. Devendravan Goswami PW1 conducted the postmortem of the dead body and found that there were injuries on the neck, on the breast, on the wrist of the dead body. As per the internal examination, lungs were found congested and in the opinion of Dr. Devendravan, the cause of death was asphyxia due to throttling. Viscera was preserved by the Doctor and was sent to Forensic Science Laboratory. According to report of Forensic Science Laboratory - at Exh.21, the viscera which was sent for test, did not contain any poison. Therefore, the cause of death due to asphyxia by throttling was confirmed and thereafter on behalf of the State a complaint came to be lodged by R.K. Vaghela, Police Sub-Inspector, Visnagar Police Station against the present appellant and investigation of the offence was carried out by one Kakusinh Ranajitsinh Vaghela of Visnagar Police Station. After investigation, a charge-sheet for the offence under Section 302 was submitted against the present appellant in the court of Judicial Magistrate, First Class, at Visnagar and in turn the case was committed to the Court of Sessions at Mehsana. A charge was framed against the present appellant vide Exh.4 to which he pleaded not guilty and hence prosecution examined in all five witnesses and produced documentary evidence. After recording of the statement of the accused under Sections 313 of the Criminal Procedure Code and hearing prosecution as well as defence, learned trial Judge came to the conclusion that prosecution was able to prove the charge of Section 302 of the IPC against the present appellant and vide above said judgment and order dated 31st May, 1995 present appellant was convicted and was sentenced for the life imprisonment. Being aggrieved, this Appeal is filed through Jail by the appellant.

3. Learned Advocate Mr. F.B. Brambhatt for the appellant and learned APP Mr. K.G. Sheth were heard.

4. Learned Advocate Mr. Brambhatt on behalf of the appellant vehemently urged that this is a case of circumstantial evidence and prosecution could not

establish all the links to form a complete chain. It was argued that the case rests on the principle that the deceased was seen last together with the appellant. It was argued that the evidence of prosecution that the deceased was last seen with the appellant is doubtful. Our attention was drawn to the evidence of PW-3 Amratben Exh.25, PW-4 Malaben, Exh.26 and relying on the cross-examination of these two witnesses, it was argued that before the Police both the witnesses stated that on the day of the incident, Ramila alone visited the house of Dharmiben and therefore the presence of the accused at the scene of offence at the time of commission of offence becomes doubtful. It was then argued that when the case rests upon circumstantial evidence, it is necessary that the prosecution should prove motive behind the crime. No motive, according to the learned advocate for the appellant, is forthcoming from the prosecution evidence. It was urged that in the deposition of the I.O. in the cross-examination, it is admitted by him that Dharmiben was not of a good character and was doing some illegal activities through women at Visnagar and she could not therefore be believed. Relying on the evidence of the Investigating Officer - PW5 Kakusinh, it was further urged that Ramilaben, when she came to the house of Dharmiben, was drunk to the extent that she was almost unconscious. It was urged that from the evidence of the Investigating Officer it has become clear that the present appellant was at his native place at village Hathej, Taluka Nadiad, District Kheda even 15 days before the date of incident. It is urged that there are contradictions in the deposition of the witnesses as to how the complaint came to be filed by Dharmiben before Visnagar Police Station. It was lastly urged for the above said reasons that the case of the prosecution becomes doubtful and all links are not proved by prosecution, and allowing this appeal, appellant is required to be acquitted.

5. Learned APP Mr. Sheth has supported the judgment of the Trial Court.

6. We have reappreciated the whole evidence led by the prosecution generally and also with reference to the contentions raised by the learned advocate for the appellant. PW1 Dr. Devendravan Goswami is examined at Exh.6 who had conducted the postmortem examination of the deceased, and in the opinion of this witness, the cause of death was asphyxia due to throttling. PW2 Dharmiben is examined at Exh.9 states that appellant and Ramila visited her house on 7th November, 1994 for claiming a sari as per custom. They were given a room adjoining to

her house and at about 9'O clock the present appellant and the deceased had slept in the said room. In the morning, Amratben daughter of her sister Bhikiben informed that Ramila was lying dead in the said room and that appellant was not found around. She had been to Kalol and informed Malaben, her daughter Banuben and Hinmatji Shankerji, husband of Bhanuben. All of them came to Visnagar and after visiting the room where dead body of Ramila was lying, Dharmiben informed Visnagar Police by a report which is on record at Exh.23. This is the report which was treated as Accidental Death Inquiry No. 22 of 1994 of Visnagar Police Station. PW-3 Amratben is examined by the prosecution at Exh.25 who stated that on the day of the incident present appellant and Ramilaben visited the house of Dharmiben for claiming a sari. Accommodation was given to Ramilaben and the present appellant in the room adjoining to the house of Dharmiben for sleeping and both of them slept in the adjoining room. The next day morning she went to awaken them and she found that Ramilaben was lying dead and the appellant was absconding. Amratben - PW3 - Exh.25 supports in all respect to the version of Dharmiben. P.W.4 Malaben Ex.26 also supports the say of other two witnesses that on informing by Dharmiben, she along with her daughter Banuben and son-in-law Hinmatji Shankarji visited Visnagar and found Ramila lying dead. Thereafter Dharmiben informed the Visnagar Police Station about the death of Ramilaben. PW-5 Exh.27 Kakusinh Ranajitsinh Vaghela, Investigating Officer, is examined by the prosecution. We found some very significant facts from the deposition of PW-5, that the accused appellant was apprehended on 10th November, 1994 from village Hathej, the native place of the accused. Meaning thereby that appellant was arrested after 3 days of incident.

7. We scrutinised the above evidence on record tendered by the prosecution. There is nothing on the record or in the cross-examination of the defence to disbelieve the above said witnesses. PW2 Dharmiben and PW3 Amratben both categorically stated that the appellant and Ramila both visited Dharmiben and they were given a room for the night adjoining to the house of Dharmiben. In the morning Ramila was found lying dead. Defence could not show anything to dislodge this version of the prosecution through these witnesses. Learned Advocate Mr. Brambhatt for the appellant has drawn our attention to the contradictions between the depositions of PW2 Dharmiben and PW3 Amratben and PW4 Malaben and stated that in their cross-examination it was asked to each of the witnesses that they stated before the Police that Ramila had alone visited the house of Dharmiben two days

before the day of the incident. However, these contradictions could not be proved by defence through the evidence of Investigating Officer. Nothing was asked to the Investigating Officer, PW5 that whether any of these witnesses had stated so in the statement recorded by him under Section 162 of the Criminal Procedure Code and hence in fact the supposed contradictions to which our attention was drawn by the learned Advocate for the appellant, can not be considered to be the evidence in contradiction at all. Unless contradictions between the depositions of the witnesses and the statements which they might have offered before the Police are proved through the Investigating Officer, according to law, such contradictions does not form part of the evidence and, therefore, we cannot accept the argument of the learned Advocate for the appellant that the prosecution case, as to the fact that the appellant was last seen in the company of the deceased, is doubtful. On the contrary, the prosecution through the above evidence sufficiently proved that the appellant was seen last together in the company of the deceased and was found absconding on the next morning. Motive is hardly a relevant factor to be proved by the prosecution in this type of cases. It is not a rule of law that the prosecution in all cases is obliged to prove the motive. Absence of motive behind crime would not absolve the appellant from the liability of the charge levelled against him. This is so because the motive lies in the mind of the accused and many a times cannot be known by others.

8. Firstly, the evidence of PW2 Dharmiben, PW3 Amratben and PW4 Malaben is reliable, unimpeachable and creditworthy to come to the conclusion that the appellant was seen last together in the company of the deceased. Secondly, by medical evidence through PW1 Dr. Devendravan it is sufficiently proved by the prosecution that the death of the deceased was due to asphyxia on account of throttling. The third important factor is the accused was found after two days from the day of incident at his native place. The arrest panchnama in this respect which is at Exh.17 is admitted by the defence which is evident from the documentary list produced by the prosecution at Exh.5. In these circumstances, it was for the accused appellant to explain that how he was not found by PW3 Amratben in the room which was allotted to the couple. Further it was also for the accused appellant to explain that how he was arrested after two days from village Hathej, his native place. We do not find any such explanation either from the cross-examination of the defence or from the further statement of the accused appellant. When husband and

wife are lastly seen together and one of the spouse meets with homicidal death, the other spouse is required to explain the circumstances, appearing against him or her. Even otherwise, the defence has not made any suggestion to the prosecution witnesses that Ramila might have been killed by an outsider, or any other person.

9. In this view of the matter and on appreciating all the evidence, we have no hesitation to come to the conclusion that the death of Ramilaben was homicidal, by asphyxia due to throttling. Evidence also establishes that the present appellant was last seen together in the company of the deceased. The accused appellant failed to offer any explanation about the circumstances. The prosecution is eminently able to establish the case against the appellant beyond any reasonable doubt. The learned Trial Judge came to right conclusion to convict the accused for the charge under Section 302 of the Indian Penal Code levelled against him. We do not find any reason to interfere with the judgment impugned in this Appeal.

10. For the reasons aforesaid this Appeal stands dismissed.

(Y.B.Bhatt, J.)

(J.R. Vora, J.)

p.n.nair